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December 8, 2021

Submitted Electronically via <https://foiaonline.gov/>

Freedom of Information Officer
Environmental Protection Agency
1200 Pennsylvania Avenue NW (2822T)
Washington, DC 20460

Re: Petition to Revise Clean Water Act Regulations for Concentrated Animal Feeding Operations

Dear EPA FOIA Officer:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch (FWW).

FWW and its members have a strong interest in information related to the Environmental Protection Agency's (EPA) review of and response to the 2017 Petition for Rulemaking to revise Clean Water Act (CWA) regulations for concentrated animal feeding operations (CAFOs) that FWW submitted to EPA on behalf of itself and thirty-two public interest organizations (CWA Petition).¹ FWW is a national, non-profit, membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. Industrial livestock pollution is one of FWW's priority issues, and it is engaged in several campaigns to reduce CAFO pollution nationally through stronger regulation, transparency, and enforcement.

Records Requested

Pursuant to FOIA, FWW requests copies of any and all documents, records and communications of any kind, including but not limited to e-mails, interoffice memoranda, and notes, (hereinafter records), relating to EPA's review of and response to the CWA Petition. Unless otherwise stated, FWW is only requesting records and communications dated on or after April 15, 2021 through the date of production. FWW specifically requests the following:

¹ See Food & Water Watch, et. al. Petition to Revise Clean Water Act Regulations for Concentrated Animal Feeding Operations (Mar. 8, 2017). Petitioners include six public interest advocacy organizations with national memberships, and twenty-seven state and community-based organizations representing members in Arizona, Arkansas, California, Illinois, Iowa, Maryland, Minnesota, Missouri, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Dakota, Virginia, and Wisconsin. EPA confirmed receipt of the CWA Petition by letter dated April 3, 2017.

1. All EPA communications related to the CWA Petition;
2. All records related to any substantive review EPA has undertaken of CWA regulations for CAFOs since receiving the CWA Petition;
3. All records related to EPA's forthcoming response to the CWA Petition, including any documents or communications that relate to a timeline for issuing a response; and
4. Any and all records EPA relied upon when conducting the 2020 annual review of effluent limitation guidelines for CAFOs, pursuant to 33 U.S.C § 1314(b), including any informal or formal reports or memoranda documenting the results of the annual review process, or decisions reached regarding the need to further review or revise CAFO effluent limitation guidelines.

This request applies to all such records in any form, including (without limit) correspondence sent or received, memoranda, notes, telephone conversation notes, maps, analyses, agreements, contracts, e-mail messages, e-mail attachments, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. This request does not include any records that EPA currently maintains on its website.

To save resources and mailing expense, we request electronic copies of these documents whenever available. In addition, rather than waiting until all requested records have been assembled for the time period requested, FWW asks that you disclose responsive records as they become available to you.

Claims of Exemption from Disclosure

If you regard any requested records or portions of records as exempt from disclosure under FOIA, FWW asks that you please exercise your discretion to disclose them nonetheless. After careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide any reasonably segregable non-exempt portions of exempt records, as required by FOIA. Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal the denial. In accordance with the minimum requirements of your due process, this information should include:

1. Basic factual information, including the author, origin, date, length, and address of withheld records or portions of records; and

2. Explanations and justifications for denial, including identification of the exemption(s) applicable to the withheld information and explanations of how each exemption applies to each withheld record or portion of a record.

Fee Waiver Request

FWW requests that you waive any applicable fees for this request because disclosure is clearly in the public interest. As described below, disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups such as FWW access to government documents without the payment of fees. The statute is to be liberally construed in favor of waivers for noncommercial requesters. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). EPA granted a fee waiver for a nearly identical request that FWW submitted on April 15, 2021 (request number EPA-2021-003750), related to EPA’s review of and response to the CWA petition between March 2017 and April 2021. As explained below, FWW continues to satisfy the criteria for a fee waiver established in FOIA, described as a multi-factor test in EPA’s implementing regulations, 40 C.F.R. § 2.107(l).

Requirement 1: Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government

Factor 1: The subject matter of the requested documents concerns operations or activities of the federal government

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government,” 40 C.F.R. § 2.107(l)(2)(i), because the request relates to EPA’s records and communications concerning EPA’s response to the CWA Petition, and any subsequent review it has undertaken regarding CWA regulations for CAFOs. EPA’s response will impact the EPA’s and states’ ability to require CAFO permits, and enforce stricter monitoring and discharge reduction requirements on CAFOs.

Factor 2: The disclosure is “likely to contribute” to understanding of federal government operations or activities

Disclosure is “likely to contribute” to an “increased public understanding” of EPA’s operations or activities, 40 C.F.R. § 2.107(l)(2)(ii), because such disclosure will enable FWW and the public to understand the status of EPA’s review of the CWA Petition, how EPA has and has not acted to implement the recommendations outlined in the petition, and to what extent the issues raised in the CWA Petition have affected its decision-making process for recent regulatory decisions EPA has made with regard to CAFOs. As outlined in the CWA Petition, EPA’s current regulatory approach for CAFOs is not adequately protective of water quality. Specifically, the current regulations fail to require effluent monitoring, do not prohibit practices known to harm water quality, generally ignore numerous pollutants of concern, place critical decisions about waste

management in the hands of the state agencies, and exempt most chronic CAFO discharges from permit requirements through an unreasonably broad reading of the agricultural stormwater exemption. Despite these clear flaws in the current regulatory scheme, and the fact that CAFOs continue to be one of the nation's leading sources of water quality impairment,² EPA has apparently made no attempt to revise CWA regulations for CAFOs, or respond to the CWA Petition. In fact, since FWW and co-petitioners filed the CWA Petition, EPA has affirmatively refused to revise CAFO effluent limitation guidelines when those regulations came up for review,³ and further decided to remove combatting CAFO-related water pollution as one of its national enforcement priorities.⁴ The requested information will contribute to the public's understanding of EPA's efforts to review the regulatory course of action recommended by the CWA Petition, and consequently, to what extent its recent and upcoming regulatory actions concerning CAFOs are being or will be informed by the information and recommendations presented in the CWA Petition.

This information is not already accessible through EPA's websites. See Factor 4, below. The requested information is critical to gaining an understanding of these EPA operations and activities.

Factor 3: The disclosure will contribute to "public understanding" of EPA's operations and activities

The disclosure will contribute to "public understanding" of the subject of the request because it will contribute to the understanding of a "reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 2.107(l)(2)(iii). *See also Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (in determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.").

FWW will effectively disseminate the records and otherwise make the records and information in the records accessible and available to a broad audience of interested persons. It will do so in ways that effectively contribute to the public's understanding. FWW is a membership organization with a staff of approximately 115, including researchers, organizers, attorneys, and communications professionals. FWW has scientific and legal expertise and our staff regularly analyze data, including FOIA records, and use this information to write, speak, and advocate to the media and the public on environmental issues. FWW frequently uses FOIA records and other

² EPA, *National Water Quality Inventory: Report to Congress 3* (Aug. 2017), available at: https://www.epa.gov/sites/production/files/2017-12/documents/305brtc_finalowow_08302017.pdf.

³ *See, e.g.,* EPA, *Preliminary Effluent Guidelines Program Plan 15* (Sep. 2021), available at: https://www.epa.gov/system/files/documents/2021-09/ow-prelim-elg-plan-15_508.pdf (presenting findings from the 2020 annual review); EPA, *Effluent Guidelines Program Plan 14* (Jan. 2021), available at: https://www.epa.gov/sites/production/files/2021-01/documents/eg-plan-14_jan-2021.pdf (presenting EPA findings from 2017 – 2019 annual reviews).

⁴ *See* EPA, *EPA announces FY 2020-2023 Priorities for Enforcement and Compliance Assurance* (Jun. 12, 2019), available at: <https://www.epa.gov/newsreleases/epa-announces-fy-2020-2023-priorities-enforcement-and-compliance-assurance>.

public data to draft and issue policy-based reports, issue briefs, fact sheets, and blog posts related to CAFOs and water pollution, and other issues of public interest.⁵ FWW has a long history of analyzing federal government CAFO records, specifically, and making them available to the public in a way that is easy to understand. Moreover, FWW works to provide objective analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health. Factory farm water and air pollution is one of FWW's focal issues and FWW has developed expertise on these issues. Because of our expertise in this area, FWW is well-positioned to analyze the records we receive pursuant to this request and evaluate whether EPA's current course of action will result in adequate CWA regulation of CAFOs.

In addition to being able to analyze the information provided to determine how EPA is considering the recommendations made in the CWA Petition, and whether EPA's actions will result in adequate regulation of CAFO-related water pollution, FWW has the "ability and intention to convey this information to the public." 40 C.F.R. § 2.107(l)(2)(iii). FWW is well-positioned to provide plain-language analysis of these documents and effectively disseminate the information obtained from the disclosed records such that it reaches a broad audience of interested members of the public through diverse and highly effective channels. These channels include: traditional media outlets; FWW's website, Facebook pages, other social media outlets, and newsletter; FWW webinars; press releases; blog posts; presentations at community meetings and conferences attended by rural citizens impacted by CAFO pollution, environmental attorneys and advocates, journalists, and other interested members of the public; and emails to some or all of FWW's hundreds of thousands of supporters. FWW's work on CAFO pollution and EPA regulation of CAFOs has garnered significant media attention, including coverage in Reuters, Politico, Inside EPA, Bloomberg, Greenwire, and other state and local outlets across the country, demonstrating FWW's ability to reach interested members of the public with the requested information. Further, FWW is well-known to interested members of the public and to other organizations with interested members as a national leader on issues related to CAFO pollution, which facilitates FWW's dissemination of information to this audience.

Factor 4: The disclosure is likely to contribute "significantly" to public understanding of EPA activities

The public's understanding of government operations or activities related to EPA's CWA CAFO regulations "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because FWW, other CWA petitioners, our coalition partners, and interested members of the public know little about EPA's recent actions in response to the CWA Petition, including whether it has undertaken any substantive review of its recommendations, when it plans to issue a formal response, and if the agency plans to revise its regulation of CAFOs under the CWA in the future, public understanding of these efforts will undoubtedly be enhanced to a significant extent by

⁵ See, e.g., FWW, *Factory Farm Nation: 2020 Edition* (Apr. 2020), available at: https://foodandwaterwatch.org/wp-content/uploads/2021/03/ib_2004_updfacfarmmaps-web2.pdf; FWW, *The Urgent Case for a Ban on Factory Farms* (May 2018), available at: https://foodandwaterwatch.org/wp-content/uploads/2021/04/rpt_1805_urgent_case_to_ban_factory_farms-final-final-web.pdf.

disclosures in response to this request. Revision to existing CAFO rules, or the lack thereof, will have a defining impact on water quality protections for rural communities across the United States. Those communities living near CAFOs are directly affected and particularly interested in EPA's decision-making process surrounding future CAFO rulemakings, but the public at large will also benefit from insight into how EPA will address CAFO water pollution going forward.

None of the records requested are currently available on EPA's website, elsewhere on the Internet, or have been previously published by EPA. As a result, interested members of the public are currently largely in the dark regarding whether and how EPA will strengthen its regulation of CAFO water pollution. The requested records have significant informative value, and will meaningfully increase transparency with regard to EPA's decision-making process concerning regulatory oversight of CAFO water pollution.

As discussed above, FWW is experienced at analyzing, synthesizing, and distilling voluminous and complex federal agency records and making them available and easily understandable to interested members of the public. In so doing, FWW is able to ensure that the increase in public understanding of EPA's review of CAFO regulatory recommendations will be significant.

Requirement 2: Disclosure is not primarily in the commercial interest of the Requester

Factor 1: FWW has no commercial interest in obtaining the information

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. Two factors must be addressed when determining whether the information requested is "primarily in the commercial interest of the requester[s]." 40 C.F.R. § 2.107(l)(1). The first factor is whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i). Here, as a nonprofit organization, FWW has no commercial, trade, or profit interest in the material requested. FWW will not be paid for, or receive other commercial benefits from, the publication or dissemination of the material requested. The requested material will be disseminated solely for the purpose of informing and educating the public and will not be used for or result in commercial gain.

Factor 2: Disclosure is not "primarily in the commercial interest of the requester"

The second factor of the commercial interest consideration hinges on the primary interest in the disclosure, and requires a weighing of any commercial interest against the public interest in disclosure. 40 C.F.R. § 2.107(l)(3)(ii). FWW's sole interest in obtaining the requested information is to broaden public understanding of EPA's decision-making process concerning the revision of CWA CAFO regulations. Therefore, this is a situation in which the "public interest is greater in magnitude than that of any identified commercial interest" of the requester. *Id.* Of course in this case, even if the public interest were not so significant, it would clearly outweigh the nonexistent commercial interest, such that the disclosure is clearly primarily in the public interest. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" FWW and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

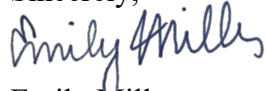
Conclusion

Accordingly, based on the above analysis, the requested records bear directly on identifiable operations and activities of the EPA, will contribute significantly to a broad public understanding of the EPA's decision-making process concerning the revision of CWA CAFO regulations, and will not serve any commercial interest on the part of FWW. Under these circumstances, FWW fully satisfies the criteria for a fee waiver. If for some reason EPA denies the fee waiver in whole or in part, please contact me before incurring any costs related to this request. If EPA does not fully grant the fee waiver and costs are incurred prior to contacting me, FWW will not be responsible for those costs. FWW reserves the right to appeal any decision to wholly or partially deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at (646) 369-7526 or eamiller@fwwatch.org.

Thank you in advance for your prompt reply.

Sincerely,

A handwritten signature in blue ink that reads "Emily Miller".

Emily Miller
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